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HRD09/4345

May 22, 2009

Honorable Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

RE: Request for comments on Waiolani Mauka Community Association's Surface Water Use Permit Application – Existing Use, Nā Wai `Ehā Surface Water Management Areas, Maui.

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on Waiolani Mauka Community Association's (Waiolani Mauka) Surface Water Use Permit Application (SWUPA) for an existing use in Nā Wai `Ehā's Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "the Commission may reclaim instream values to the inevitable displacement of existing offstream uses" (emphasis added)). Nor can it be determined whether there are "competing applications" within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, Waiolani Mauka should not have any priority simply by virtue of the fact that it filed its SWUPA earlier than other existing users.

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As a commercial offstream user, Waiolani Mauka has a heavy burden to justify its use; at the very least it must show that its use is reasonable-beneficial and that it has no practicable alternative water source. See *In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 161, 9 P.3d 409, 473 (2000) ("Waiāhole"). Waiolani Mauka cannot meet this burden because its SWUPA indicates that its existing use is far more than necessary for efficient utilization. Waiolani Mauka claims an existing use of 75,465 gallons per day (gpd), of which 62,000 gpd is used to water the grass on a 2-acre park and 13,465 gpd is used to water 0.5 acres of common area and five street islands with trees. (SWUPA, Tables 1 and 2). This use amounts to 31,000 gad for the park and 26,930 gad for the common areas and street trees, an order of magnitude higher than the 1,700 gad allocated by the Maui County Department of Water Supply for parks. Such profligate overuse of a public trust resource cannot be countenanced.

Waiolani Mauka's SWUPA also does not reflect any thoughtful consideration of practicable alternative sources. It has concluded, with no evidence of any analysis, that alternatives such as municipal water and ground water are "cost prohibitive." (See Table 4.) Those alternatives may, however, be significantly less expensive than what Waiolani Mauka apparently pays Wailuku Water Company (WWC) for diverted stream water. According to the chart of its customers WWC submitted at the close of the IIFS contested case hearing, Waiolani Mauka was not a customer as of March 2008. (See Exh. D-3.) Presumably, therefore, its claimed existing use from May 2007 through April 2008 was pursuant to the Water Delivery License granted to the general engineering contractor on the Waiolani Mauka project, P.B. Sullivan Construction. (See Exh. D-85). Pursuant to that license, which is terminable upon three day's notice, the Water Delivery Charge paid to WWC is \$2.40 per thousand gallons. (*Id.*)

For the foregoing reasons, OHA objects to Waiolani Mauka's SWUPA.

OHA is the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians." (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at granta@oha.org.

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o
Administrator

C: OHA CRC Maui